IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE SIDE

CRIMINAL REVISION APPLICATION NO.349 OF 2005

Arun Gulab Gawli .. Applicant

V/s.

The State of Maharashtra .. Respondent.

Shri.A.P.Mundargi for the applicant.

Shri.P.A.Pol for the respondent.

CORAM : S.C.DHARMADHIKARI, J.

DATE OF RESERVING THE ORDER : 17TH NOVEMBER, 2006.

DATE OF PRONOUNCEMENT : 10TH JANUARY, 2007.

JUDGEMENT : -

1. Rule.

2. By consent, Rule made returnable forthwith. Respondents waive service.

3. This revision application challenges the order dated 26th August, 2005 delivered by the learned Additional Sessions Judge, Gr.Bombay in Miscellaneous Application No.910 of 2005 in Sessions Case No.894 of

2004. By the order under challenge, the learned Additional Sessions Judge has dismissed the above Miscellaneous Application. In other words, he has refused to discharge the present applicant from the above Sessions Case.

4. The facts which are necessary for appreciating the rival contentions are set out hereinbelow.

5. A FIR was lodged at Agripada police station being C.R.No.214 of 1990 alleging offences punishable u/s.387, 506 (II), 34 of I.P.C. r/w. Sec.3, 25 of Arms Act.

6. The first informant Ahmed Rahim Shaikh alleged that he resides at the address mentioned in the FIR. In other words, he resides at Allarakha Building, Moulana Azad Road, Mumbai. He is residing with his wife and children so also his brother. The business of the first informant and his brother is of conducting Mutton Shop. Further, the first informant is in the employment of one Ratilal Shah, commission agent and building contractor. He states that Ratilal Shah pays him Rs.800/- per month.

7. It is alleged by him that he knows the applicant and one Subhash Gawade. According to him, they are gundas

and reside in Dagdi Chawl at Agripada. It is alleged by him that on 21st April, 1990 at about 11.00 a.m., the first informant was sitting on a bench in the Varanda in front of his room. At that time, two unknown persons approached him. He was told that you have been called to Dagdi Chawl by Bhai i.e. the applicant. It is alleged that since the applicant was scared, he accompanied the persons. At the entrance of Dagdi Chawl, one of the person, who had come to the first informant to call him took him to a room behind the temple of Lord Shiva/Shankar. In the room, apart from the two persons, one person aged 36-38 years was sitting on a Sofa. He asked the first informant his name so also that of his employer. The first informant replied and gave the name of his employer as Ratilal Shah.

8. It is alleged that the first informant was told to produce his employer Ratilal Shah or else bring four boxes. According to the first informant, the words "four boxes/petties" means a sum of Rs.4.00 lacs. The person sitting on the Sofa thereafter threatened the first informant by telling him that if the amount is not brought, he will have to face dire consequences. He took out one revolver and also removed four bullets therefrom. He kept the revolver on the teepoy and told the first

informant that he must see the revolver carefully. At that point of time Subhash Gawade approached the first informant and asked the details pertaining to his employer. However, the first informant contacted his employer on telephone but his office informed the first informant that Ratilal Shah is not in his office. It is alleged that Subhash Gawade repeated the threat given by the person sitting on the Sofa. When the first informant showed his reluctance to bring such a huge sum, he was assaulted and let off.

9. The first informant alleged that he was scared and afraid. He came to his residence. Thereafter he narrated on telephone the entire incident to his employer Ratilal Shah. Ratilal Shah after the telephone conversation came to the house of the first informant and after some discussions, they approached the Agripada police station and lodged this FIR. The FIR gives details of the unknown persons allegedly present at the time of the incident so also the details of the revolver.

10. A supplementary statement was recorded on 1st May, 1990 and the same came to be recorded after identification parade.

11. The details of the identification parade have been set out in the supplementary statement. The first informant named, one Prakash Krishna Joglekar as the one who was sitting on the Sofa, on the relevant date. He identified one Subhash Gawade and Baban Tukaram Ahire. He identified the other persons also.

12. In the statement, it is stated that these persons are working for or part of Arun Gawli gang and the first informant has seen them moving around with the said Arun Gawli.

13. Thereafter, statement of one Kamalchand Eknath Thakur, Police Sub Inspector, Agripada police station is also recorded on 23rd April, 1990. He has given details of the FIR and the Identification parade. Similar statements are also recorded of one Ramchandra Dhane and Mangesh Pote. The learned Judge has observed that on going through the statements it appears that the co-accused have disclosed the name of the present applicant. That is how, the present applicant is a part of the conspiracy to commit the alleged offence. The learned Judge has observed that if the material collected is read as a whole, there appears strong suspicion about involvement of the applicant in hatching conspiracy with

co-accused to commit the alleged offence.

14. According to the learned Judge, strong suspicion is sufficient for framing of charge. In such circumstances, he rejected the discharge application. The learned Judge has also made a reference to the statement of one independant witness Shashikant Pawar.

15. Mr.Mundargi, learned senior counsel appearing for the applicant submits that the incident is alleged to have been taken place on 21st April, 1990. The Applicant accused was externed during this time. No efforts were made to arrest him. He was granted anticipatory bail. Mr.Mundargi submits that the statements of the complainant/first informant and police officials disclose no prima-facie evidence. The statement of co-accused is inadmissible in evidence. The complainant’s statement does not allege anything. On the other hand, it appears to be a case where applicant is sought to be involved in a false case only on the ground of political rivalry. The applicant has been elected to the Maharashtra Legislative Assembly. He is a sitting M.L.A. Political parties are interested in maligning him. It is therefore contended that all statements taken as they are, do not disclose that the applicant has committed the offence alleged.

16. Alternatively, Mr.Mundargi submits that all statements are inadmissible. The statement of Shashikant Pawar, which is a part of the compilation at page 56 read as a whole does not state anything, save and except reiterating and repeating the contents of the FIR. Additionally, the statement proceeds to allege that the said Shashikant Pawar knows about the activities of the applicant and his gang. The statement and version therein is based on hear-say material. It is inherently improbable. There is no prima facie proof of the applicant's involvement in the crime.

17. Mr.Mundargi also emphasized the fact that the application for discharge made u/s.227 could not have been rejected because the statement of the complainant does not disclose that the applicant is connected with the crime in any manner. The applicant has not threatened anybody nor demanded any money. He submits that the first informant does not state anywhere that the applicant was present at Dagdi Chawl at the relevant time. He does not state that the applicant was aware of the acts and deeds of the persons who called him to Dagdi Chawl. Therefore, merely because the co-accused told something and that is a part of the statement of the police officials that the learned

Judge observes that there is a strong suspicion. Mr.Mundargi submits that suspicion, howsoever, strong is not enough. In support of his submissions, Mr.Mundargi has relied upon the following decisions.

1] (1998) 7 Supreme Court Cases 337 (Suresh Budharmal Kalani alias Pappu Kalani v/s. State of Maharashtra).

2] 1994 Supp (2) Supreme Court Cases 707 (State of U.P. through Central Bureau of Investigation v/s. Dr.Sanjay Singh and another).

3] 2005 ALL MR (Cri) 739 (Prabhakar s/o Dadaji Pal v/s. State of Maharashtra).

4] 2004 (4) CHN406 (Md.Yaqub and Aloke Biswas @ Bapi v/s. State of West Bengal).

18. On the other hand, learned A.P.P. Shri.Pol submits that the application is not maintainable. It is not the stage for going into the details of the charges. This is a clear case of conspiracy in as much as everybody has mentioned the name of the present applicant. There is a statement of the co-accused to this effect. In such

circumstances, this is not a case for discharge and the application therefore be dismissed.

19. For properly appreciating the rival contentions, a reference is necessary to Sec.227 of the Code of Criminal Procedure. The same reads as under :-

> "227.Discharge :- If, upon consideration of the record of the case and the documents submitted therewith, and after hearing the submissions of the accused and the prosecution in this behalf, the Judge considers that there is not sufficient ground for proceeding against the accused, he shall discharge the accused and record his reasons for so doing."

20. In this behalf reference can usefully be made to a decision of the Supreme Court reported in **AIR 1997 SC 2041** (State of Maharashtra vs. Priya Sharan Maharaj and others). After referring to Sec.227 of Cr.P.C. and power of the Sessions Court to discharge the accused, this is what is observed by the Supreme Court : -

> "8: The law on the subject is now

well-settled, as pointed out in Niranjan Singh Punjabi v. Jitendra Bijjaya, (1990) 4 SCC 76: (AIR 1990 SC 1962), that at Sections 227 and 228 stage the Court is required to evaluate the material and documents on record with a view to finding out if the facts emerging therefrom taken at their face value disclose the existence of all the ingredients constituting the alleged offence. The Court may, for this limited purpose, sift the evidence as it cannot be expected even at that initial stage to accept all that the prosecution states as gospel truth even if it is opposed to common sense or the broad probalities of the case. Therefore, at the stage of framing of the charge the Court has to consider the material with a view to find out if there is ground for presuming that the accused has committed the offence or that there is not sufficient ground for proceeding against him and not for the purpose of arriving at the conclusion that it is not likely to lead to a conviction."

. In a later decisions reported in **AIR 2002 SC 564** (Dilawar Babu Kurane v/s. State of Maharashtra), the Hon’ble Supreme Court observes thus : -

"12: Now the next question is whether a prima facie case has been made out against the appellant. In exercising powers under Section 227 of the Code of Criminal Procedure, the settled position of law is that the Judge while considering the question of framing the charges under the said section has the undoubted power to sift and weigh the evidence for the limited purpose of finding out whether or not a prima facie case against the accused has been made out; where the materials placed before the Court disclose grave suspicion against the accused which has not been properly explained the Court will be fully justified in framing a charge and proceeding with the trial; by and large if two views are equally possible and the Judge is satisfied that the evidence produced before him while giving rise to some suspicion but not grave suspicion against the accused, he will be fully justified to discharge the accused, and in exercising jurisdiction under Section 227 of the Code of Criminal Procedure, the Judge cannot act merely as a post office or a mouthpiece of the prosecution, but has to consider the broad probalities of the

> case, the total effect of the evidence and the documents produced before the court but should not make a roving enquiry into the pros and cons of the matter and weigh the evidence as if he was conducting a trial."

21. The first decision **(Suresh Kalani v/s. State of Maharashtra)** which is relied upon by Shri.Mundargi states that mere suspicion of kidnapping cannot serve as a sufficient ground for framing the charges in the absence of any material, prima facie, showing that the particular motive has passed into an action and that the accused is conncected with that action in question. The decision of the Supreme Court is rendered on an application for discharge. The Hon’ble Supreme Court has in a case where the applicant-accused was alleged to be guilty of murder observed that the object of the provision which requires the Sessions Court to record its reasons is to enable the superior court to examine the correctness of the reasons for which the Sessions Judge has held that there is no sufficient ground for proceeding against the accused. The Hon’ble Supreme Court has observed that when there is no direct evidence to prove the conspiracy, then, the circumstantial evidence even if accepted in its entirety creates only a suspicion of a motive that is not enough to

proceed in a criminal case.

22. The second decision is with regard to the evidentiary value of a confession of co-accused. The Hon'ble Supreme Court has observed that at the stage of framing of charges, the court is required to confine its attention to only those materials collected during the investigation which can be legally translated into evidence and not upon further evidence (Dehors those materials) that the prosecution can bring at the trial which would only be after the charges are framed and the accused denies the same. The requirement in law is to have legally admissible evidence. That is the requirement for framing charges. In other words, the materials collected during the investigation should be capable of being legally translated into evidence and only then the charge can be framed.

23. The decisions of the Hon'ble Supreme Court relied upon by Shri.Mundargi are also noticed by a learned Single Judge of this Court in and it is held that confessional statement of a co-accused cannot be relied upon for framing charge against the applicant-accused.

24. In the present case, apart from the statements of

the police official and the first informant which makes reference to the statement of the co-accused with regard to the alleged activities of the applicant before me, there is no material on record at all. The learned Judge in Para 7 of his order has made reference to the recovery panchanama. The recovery is at the instance of the co-accused. Thereafter, he refers to the proceedings of the identification parade and the statement of the employer of the first informant Ratilal Shah. There is absolutely nothing in this statement as well. Even the statement of Shashikant Pawar makes reference to the alleged incident. It refers to the activities of the applicant and his gang. Thus, all statements are to the effect that the person making them has learnt that the first informant was summoned by the applicant and the activities of the gang are of extortion and kidnapping for the sake of extracting money so also of intimidation. Thus, the test of grave suspicion is not satisfied in this case. In this behalf, it would be worthwhile reproducing Para 7 and 8 of the impugned order. They read thus:-

> 7. "On hearing lengthy submission and on going through original investigation papers produced by I.O. it appears that while lodging F.I.R. on 21/4/90 complainant referred name of

applicant called by him at his residence through unknown persons who brought him to the residence of applicant where he was threatended by co accused for extorting money at the point of revolver, gupti and other weapons. On going through different panchanamas it appears that there is recovery of revolver, gupti at the instance of co accused. On going through different memorandum of parades it appears that co accused identified by complainant and witnesses specifying role of each co accused during parade. On going through statement of employer of complainant Ratilal Shah dated 22/4/90 it appears that he disclose before police that applicant is having one Bunglow in the area known as Dagdi Chawl, Agripada Bombay and there is one office at the ground floor of the building and applicant using that office forming conspiracy with his associates who use to extort money by bringing victims at the said place and threatening the victim at the point of revolvers, choppers, swords and other weapons and if anybody refused to pay extorted money they use to beat them murcylessly and use to kill them. On going through evidence of an independant witness Shashikant Pawar dated

22/4/90 it appears that he discloses before police that two unknown persons picked up complainant to the residence of applicant threatening him as called by applicant. He further disclose that applicant and his associates use to create conspiracy from time to time to commit serious offences like extortion and due to fear nobody dared to inform police because applicant and his associates always having revolver, pistool, choppers, sword, gupti, knife. On going through further statement of complainant dated 1/5/90, it appears that he referred name of applicant to whom he had seen moving with his associates (co accused) to whom he had identified during I-parade.

8. On going through police statements of 3 police officers whose names referred above it appears that they disclose while recording their statements that co-accused disclose name of applicant with whom co-accused hatched conspiracy to commit the alleged offence one day prior to commission of offence. If all the evidence referred above read together there appears strong suspicion about involvement of applicant for

hatching conspiracy with co accused to commit alleged offence which strong suspicion is sufficient for framing of charge."

25. The offence alleged in the present case is punishable u/s.387 of I.P.C. That is kidnapping or abducting of any person in order that such person may be subjected, or may be so disposed of as to be put in danger of being subject to grievous hurt, or slavery, or knowing it to be likely that such person will be so subjected or disposed of. In the present case, the applicant is not accused of kidnapping or abducting at all. Once this is an admitted position, then on the basis of some statement of the employer of the applicant which is also on information or the co-accused, the applicant cannot be held to be guilty prima facie of criminal conspiracy to commit the same. The basic ingredient of offence of criminal conspiracy namely a agreement to do or caused to be done an illegal act or an act which is not illegal by illegal means is not satisfied.

26. I have considered this application on the touch stone of the definition of criminal conspiracy as well. I find that the material placed on record is totally lacking in making out a prima-facie case against the

applicant-accused. The suspicion, in the facts of the present case, is not enough to proceed against the applicant. Therefore, as observed by the Supreme Court, no charge can be framed against the applicant herein. Even the offence of criminal intimidation is not made out. A bare perusal of the provisions in IPC defining "criminal intimidation" would make it clear that as far as present applicant is concerned, there is no material to arrive at a prima-facie conclusion that the applicant committed an offence u/s.506 (Part II) of IPC.

27. Mr.Pol would however rely upon the judgement of this Court pertaining to this very applicant. The said judgement is reported in **1998 Criminal Law Journal Pg.4481** (Arun Gulab Gawli v/s. State of Maharashtra). However, perusal of the same would indicate that there the material produced indicated strong suspicion and the Court was therefore justified in framing the charges. Thus, this judgement is distinguishable on facts.

28. For the above reasons, I am of the opinion that the learned Judge has committed a grave error apparent on the face of the record in dismissing the application of the applicant for discharge. There is merit in the contentions of the applicant that there is absolutely no

material to connect the applicant with the offences alleged. This is a fit case for exercise of Revisional jurisdiction of this court in as much as the court below has overlooked the fact that the ingredients of the offence as alleged against the applicant are prima facie not satisfied in the facts of this case. The learned Judge ought to have exercised the jurisdiction vested in him u/s.227 of the Code of Criminal Procedure and discharged the applicant from the Sessions Case. His order refusing to do so suffers from total non application of mind and can safely be termed as perverse.

29. In the result, the impugned order is quashed and set aside. The applicant-accused is discharged from the Sessions Case No.894 of 2004. Rule is made absolutely in terms of prayer clause (c).

(S.C.Dharmadhikari, J.)